

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2014120610

v.

SAN RAMON VALLEY UNIFIED  
SCHOOL DISTRICT AND ITS SPECIAL  
EDUCATION LOCAL PLANNING AREA.

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2014110093

v.

SAN RAMON VALLEY UNIFIED  
SCHOOL DISTRICT AND ITS SPECIAL  
EDUCATION LOCAL PLANNING AREA.

ORDER FOLLOWING PREHEARING  
CONFERENCE; DENYING REQUEST  
TO CONTINUE DATES AND SETTING  
DUE PROCESS HEARING DATES

On March 30, 2015, a telephonic prehearing conference was held before Administrative Law Judge Adeniyi A. Ayoade, Office of Administrative Hearings. Student's mother (Parent), and Robert K. Closson, Doctor of Education, appeared on behalf of Student. Jan E. Tomskey, Attorney at Law, appeared on behalf of the San Ramon Valley Unified School District and its Special Education Local Planning Area (SELPA).<sup>1</sup> San Ramon representatives Karen Heilbronner, Special Education Director, and Judith Cameron, SELPA Executive Director, participated. The prehearing conference was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Motion to Continue Hearing Date. On March 25, 2015, San Ramon filed a motion to continue the hearing in this matter due to unavailability of a number of its

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<sup>1</sup> San Ramon Valley Unified School District is the same as the SELPA, as San Ramon San Ramon Valley Unified School District is a single-district SELPA. Both are hereinafter referred to as "San Ramon."

witnesses, and a conflict relating to its attorney. Student opposed the motion. The motion was heard at the PHC.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

The undersigned has reviewed the request to continue the hearing date for good cause, and considered all relevant facts and circumstances. Good cause was not established for a continuance of the hearing, as the motion to continue is untimely as the current hearing date was set on January 5, 2015. Based on the information provided by San Ramon, Ms. Tomskey was aware of, and was planning, her proposed speech at, and her trip to, Wyoming as early as December 2014. The same timeliness problem exists for two of the witnesses: 1) (REDACTED) purchased her ticket for her planned April 2015 trip to Hawaii back on December 1, 2014; and 2) (REDACTED) started planning her trip in January 2015. Certainly, Ms. Tomskey could have made her request to continue the dates much earlier. Lastly, (REDACTED) "likely" unavailability failed to establish good cause for a continuance, as she is unsure whether she would actually be unavailable, or how long she would be unavailable. Therefore, based on the totality of the record, the goal of IDEA in having the due process hearing conducted and decision rendered timely, and the fact that a prior continuance was granted in this case, good cause for a continuance is not established. Accordingly, the motion to continue is denied, the due process hearing date is confirmed, and it shall remain as currently calendared.<sup>2</sup>

2. Hearing Dates, Times, and Location. The hearing in these matters shall take place at San Ramon's offices located at **699 Old Orchard Drive, Danville, CA 94526**. The hearing shall take place on April 7-9, and April 14, 2015, and continue day to day, Monday through Thursday, as needed at the discretion of the ALJ. Unless otherwise ordered, the

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<sup>2</sup> Additional dates that may be needed for unavailable witnesses can be raised and discussed on the first day of the hearing.

hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m., except for April 7 and 14, 2015 when the hearing will begin at 9:30 a.m.

San Ramon shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 ( 29 U.S.C. § 794 .), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. At a minimum, San Ramon shall provide a hearing room with separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representatives; (2) one table for the San Ramon's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. San Ramon shall ensure that all parties, witnesses and the ALJ have drinking water and tissue available to them, and that the hearing room and other facilities which will be used during the hearing are accessible.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

3. Issues and Proposed Resolutions. The issues at the due process hearing are those alleged in Student's separate requests for due process hearing (complaints).<sup>3</sup> As necessary, the issues have been clarified and reframed for clarity, as set forth below:

### **ISSUES**<sup>4</sup>

- 1) From October 26, 2012 through June 30, 2014, did San Ramon and/or SELPA deny Student a free appropriate public education by:
  - a. failing to follow Student's individualized educational program that provides Student with a full-time one-to-one aide, properly trained and qualified to have the skills and knowledge to work with Student, to keep Student on task and safe from harm;

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<sup>3</sup> On November 12, 2014, OAH dismissed Wings Learning Center as a party to Student's First Case. Therefore, Student's Issue 3, sub-issues 1 through 5, relating to alleged failures by Wings, are dismissed.

<sup>4</sup> Any issue(s) not identified in the complaints, and/or permitted by this order, shall be included only upon OAH granting a motion to amend the complaint. All amendments to the complaints shall comply with the requirements of California Education Code section 56502, subdivision (e), and such amendment will restart all applicable timelines for the due process hearing in this matter. (20 U.S.C. § 1415(c)(2)(E)(ii).) Further, in order to clarify

- b. failing to provide a safe and secure environment for Student to learn and socialize;
- c. failing to implement the goals, services and accommodations contained in Student's October 2012, August 2013, and May 2014 IEP's;
- d. failing to provide appropriate speech and language and occupational therapy assessments;
- e. failing to provide Student with a highly qualified teacher with the skills, knowledge, methodology and experience needed to work with autistic and apraxic students;
- f. failing to follow written agreement to provide Student with an augmentative alternative communication or speech generating device;
- g. failing to provide prior written notice regarding Parents' repeated requests for a transportation aide for Student's safety on the bus;
- h. failing to offer services to Student whenever Student was brought home from school due to safety concerns at school;
- i. failing to keep records regarding related services, and by tampering with or concealing important reports from parents regarding Student's services;
- j. preventing Student from receiving occupation therapy and speech and language services from independent evaluators;
- k. failing to provide Parents with timely progress reports on Student;
- l. predetermining its IEP offers to Student by failing to allow Parents meaningful participation in the IEP process, and by failing to timely provide Parents with Student's educational records when requested; and
- m. failing to apply its policies consistently, equitably and without discrimination against Student based on his disability?

2) From July 1, 2014 to October 24, 2014, did San Ramon and/or SELPA deny Student a FAPE by:

- a) failing to follow the May 2014 resolution agreement to provide and fund a one-to-one aide for Student at Wings Learning Center (Wings);
- b) failing to fund adaptive physical education services for Student at Wings;

- c) failing to have San Ramon or SELPA's representatives with knowledge about available resources and the ability to commit those resources in order to meet Student's needs at the October 2014 IEP team meeting,
- d) failing to properly and timely offer Parents notices of their procedural rights and safeguards;
- e) failing to provide Parents with prior written notice of Student's removal from Wings;
- f) failing to properly advise Wings on how to validly and appropriately conduct the October 22, 2014 IEP team meeting; and
- g) failing to properly advise Wings regarding Student's removal from Wings?

3) From October 30, 2014 through December 4, 2014, did San Ramon and/or SELPA deny Student a FAPE by:

- a) failing to provide Student with a trained and qualified one-to-one aide pursuant to Student's May 2014 IEP;
- b) failing to fund a one-to-one aide in the non-public school setting as provided in Student's May 2014 IEP;
- c) failing to appropriately supervise the implementation of Students' IEP and behavior support plan at Wings;
- d) failing to compel Wings to protect Student's special education rights;
- e) failing to provide a safe and secure environment for Student to learn and socialize;
- f) failing to implement Student's IEP goals, services and accommodations including speech and language, occupational therapy, adaptive physical education, and behavior support services as identified in Student's May 2014 IEP;
- g) failing to provide speech and language and occupational therapy assessments;
- h) failing to provide Student with a highly qualified teacher with the skills, knowledge, methodology and experience needed to work with autistic and apraxic students;

- i) failing to provide Parents with prior written notice prior to changing Student's placement and services;
- j) failing to maintain proper records of self-injurious incidents involving Student at school, tampering with and fraudulently concealing important reports from parents regarding self-injurious incidents involving Student;
- k) preventing Student from receiving occupation therapy and speech and language services from independent evaluators;
- l) failing to provide Parents with timely progress reports on Student;
- m) predetermining its November 2014 IEP offers by failing to allow parents meaningful participation, and failing to timely provide parents with Student's educational records when requested;
- n) failing to apply its policies consistently, equitably and without discrimination against Student based on his disability;
- o) failing to provide Student any educational services since November 14, 2014; and
- p) failing to timely find alternative placement for Student?

**PROPOSED RESOLUTION:** As a proposed resolution, Student seeks an order finding that San Ramon denied him a FAPE, and directing San Ramon's employees to participate in eight hours of training on autism spectrum disorder, applied behavior analysis discreet trial training, childhood apraxia of speech, executive functioning, aggressive student behavior intervention techniques, San Ramon's responsibility to monitor non-public school providers with whom it has contracts, and legal rights of special needs parents. Further, Student requests that San Ramon: 1) provide prompt supervision, immediate corrective action, and written assurances that his IEP and behavior support plan are being implemented; 2) fund Student's placement at a local non-public school through age 22 with all costs paid by San Ramon, including transportation; 3) provide Student with a community-based, non-public educational program through age 22, in a small classroom setting of not more than six students, and with one-to-one instruction and a well-trained one-to-one aide; 4) fund and support adaptive physical education for Student as provided in his IEP; 5) fund a functional analysis assessment for Student; 6) fund independent educational evaluations in the areas of speech and language and occupational therapy; and 7) provide compensatory education and supportive services for the instructional time lost by Student from November 14, 2014 to the time Student was enrolled at the non-public school

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits in a way that makes

clear the party offering it (such as “S1” or “D2”). Each exhibit shall be internally paginated, by exhibit, or all pages of a party’s exhibit binder shall be Bates-stamped or otherwise consecutively numbered. Each exhibit binder shall contain a detailed table of contents. Each party shall serve an exhibit binder containing its respective exhibits on the other party in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by a written declaration under penalty of perjury, and the ALJ rules that it is admissible.

5. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order.

The parties are ordered to meet and confer regarding the schedule of witnesses. The parties shall prepare a joint or individual proposed witness schedule(s). The proposed witness schedule(s) shall identify the witnesses each party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony.

6. Scope of Witness Examination. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall be required to establish their cases in chief during the first appearance of a witness.

7. Telephonic Testimony. A party seeking to present a witness by telephone shall move in advance for leave to do so; shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party’s exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Neither party requested telephonic testimony.

8. Electronic Recording of Hearing.

a. Audio Recording. The following conditions apply to any recording: 1) OAH’s recording is the only official recording; 2) the recorder will be turned on and off at

the same time as the ALJ's recording, to avoid recording conversations while off the record; and 3) the operation of the party's recording mechanism will not be allowed to delay the hearing. Both parties may record the proceedings.

b. Video Recording: No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

9. Timely Disclosure of Witnesses/Exhibits. The parties are to comply with Education Code section 56505, subdivision (e)(7), that provides for disclosure of witnesses and exhibits at least five business days prior to the hearing.

10. Order of Presentation of Evidence. In these consolidated matters, Student shall present his case first, followed by San Ramon. If a witness is to be called by both parties, counsel shall be prepared to ask their questions of the witness, for both direct and cross-examination, so as to prevent the need for the witness to be recalled.

11. Motions. Unless addressed herein, no pretrial motion is pending. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference.

12. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

13. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

14. Compensatory Education and Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

15. Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, or the OAH ADA Coordinator **at 916-263-0880 or [OAHADA@dgs.ca.gov](mailto:OAHADA@dgs.ca.gov)** as soon as the need is made known. Additional information concerning requests for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>. **During the prehearing conference, Student requested a one-to-one aide to assist him when he testifies at the hearing. OAH ADA Coordinator shall contact the advocate for Student, and follow up**



**with San Ramon, in order to address Student's request and ensure that Student is provided needed assistance to fully participate in the upcoming hearing.** Otherwise, neither party has requested any other accommodation for any witness or party, or for interpreter services.

16. Hearing Open To the Public. At the request of Parent, the hearing will be open to the public.

17. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

**IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.**

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

18. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: March 30, 2015

/s/

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ADENIYI AYOADE

Administrative Law Judge

Office of Administrative Hearings